Office-Supreme Court, U.S.
FILED
SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-97

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether it was arbitrary and capricious for the Copyright Royalty Tribunal, in determining a reasonable fee for coin-operated phonorecord players (jukeboxes) under Section 116 of the Copyright Act of 1976, to consider various license fees received by performing rights societies and jukebox fees paid in foreign countries.

2. Whether the Tribunal correctly concluded that Section 801(b)(1)(B) of the Act, which states that the fee should be "calculated to achieve" several objectives, including affording "the copyright owner a fair return for his creative work," does not require the agency to engage in cost analyses of the type utilized in public utility rate proceedings.

3. Whether the Tribunal exceeded its authority under Section 801 of the Act "to make determinations concerning the adjustment of reasonable copyright royalty rates" when it set a fee, which under the Act is not subject to administrative reexamination for ten years, according to a flexible schedule that phases in the fee during the initial two years and adjusts for inflation during the last three years of the ten-year period.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statute involved 1

Statement 2

Argument 7

Conclusion 14

TABLE OF AUTHORITIES

Cases:

American Textile Manufacturers Institute v. *Donovan*, 452 U.S. 490 8

National Cable Television Association v. *Copyright Royalty Tribunal*, No. 81-1005 (D.C. Cir. Sept. 10, 1982) 12, 13

Recording Industry Association of America v. *Copyright Royalty Tribunal*, 662 F. 2d 1 ..... 9, 10, 11

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 6

Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, 17 U.S.C. (Supp. IV) 101 *et seq.* 1, 2

17 U.S.C. 111 2

17 U.S.C. 115 ..... 2, 10

17 U.S.C. 116 10

Page

Statutes and regulations—Continued:

17 U.S.C. 116(b)(1)(A) 2
17 U.S.C. 116(c)(4)(B) 9
17 U.S.C. 801 2
17 U.S.C. 801(b)(1) 5, 7, 9, 11
17 U.S.C. 801(b)(1)(A)-(D) 2-3
17 U.S.C. 801(b)(1)(B) 9, 10
17 U.S.C. 801(b)(1)(D) 11
17 U.S.C. 804(a)(1) 3
17 U.S.C. 804(a)(2)(C) 3, 12
17 U.S.C. 810 6
17 U.S.C. (1976 ed.) 1(e) 2
37 C.F.R. Part 306 4

Miscellaneous:

H.R. No. 94-1476, 94th Cong., 2d Sess. (1976) 2, 12
S. Rep. No. 94-473, 94th Cong., 1st Sess. (1975) 2

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-97

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 676 F. 2d 1144. The opinion of the Copyright Royalty Tribunal (Pet. App. 35-63) is published at 46 Fed. Reg. 884.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1982. The petition for a writ of certiorari was filed on July 15, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Copyright Act of 1976, 17 U.S.C. (Supp. IV) 101 *et seq.*,[1] are set forth at Pet. App. 64-66.

[1]Unless otherwise noted, any reference to 17 U.S.C. relates to Supplement IV of the 1976 edition of the United States Code.

STATEMENT

1. Prior to 1976, a person could publicly perform a copyrighted non-dramatic musical work in a coin-operated phonorecord player (jukebox) without incurring liability to the copyright owner. 17 U.S.C. (1976 ed.) 1(e). In 1976, Congress amended the Copyright Act to remove the jukebox exemption.[2] Under the new Act, a jukebox operator could continue these performances without infringing the copyright by paying a royalty fee for a "compulsory license." Congress imposed, as an interim compromise measure, a fee of $8 per jukebox per year.[3] 17 U.S.C. 116(b)(1)(A). Congress also created a new agency, the Copyright Royalty Tribunal, to set these fees in the future. 17 U.S.C. 801.[4] Section 801(b)(1) provides that the rates are to be "reasonable" and "calculated to achieve" a number of "objectives":

> (A) To maximize the availability of creative works to the public;
>
> (B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

---

[2]Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541. Congress found that the "jukebox exemption should not be continued. Whatever justification existed for it in 1909 exists no longer * * *." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 113 (1976).

[3]The $8 fee did not reflect a level thought by Congress to be appropriate, but was a political compromise. See Pet. App. 18-19, quoting H.R. Rep. No. 94-1476, *supra*, at 113; S. Rep. No. 94-473, 94th Cong., 1st Sess. 96-97 (1975).

[4]The Tribunal also sets compulsory license fees for making phonorecords of nondramatic musical works (Section 115) and for distant retransmission by cable of non-network television and radio signals (Section 111).

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The new Tribunal was directed to commence proceedings "concerning the adjustment" of jukebox rates on January 1, 1980. 17 U.S.C. 804(a)(1). Under the Act, the Tribunal may not commence further rate adjustment proceedings unless an applicant with a significant interest in the royalty rate requests such proceedings; such a petition may be filed in 1990 and in every tenth year thereafter. 17 U.S.C. 804(a)(2)(C).

2. Pursuant to the Act, the Tribunal conducted rule making proceedings in 1980 to establish the new jukebox rate. Three performing rights societies appeared on behalf of copyright owners;[3] jukebox operators were represented by petitioner Amusement and Music Operators Association (AMOA), their trade association. All of the parties agreed that the Tribunal should adopt a flat rate, as opposed to a sliding scale fee based upon individual jukebox revenues (Pet. App. 53). However, the proposed fees varied widely (see *id.* at 36-44). At the conclusion of the proceedings, the Tribunal set the royalty fee at $50 per jukebox per year. The new fee would be phased in, with an initial fee of $25 in 1982 and 1983. The full $50 fee would be collected in 1984. In

---

[3]American Society of Authors, Composers, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

1987 and subsequent years, however, the fee would be adjusted to reflect changes in the Consumer Price Index between 1981 and 1986. 37 C.F.R. Part 306 (Pet. App. 33-34).

In reaching this result, the Tribunal rejected petitioner's argument that the Act required an inquiry into the "rate of return" for individual composers of creative works (Pet. App. 48-50). In addition, the agency found that the economic evidence presented by petitioner in support of its proposal to leave the $8 royalty fee unchanged did "not provide a basis for forming any representative picture of the jukebox industry" and did not "create a foundation for the industry's claim of economic hardship" (*id.* at 52).[6] At the same time, the Tribunal concluded that BMI's proposed fee of approximately $30 was arrived at in a manner inconsistent with the agency's statutory duty to determine a reasonable fee (*ibid.*).[7]

The Tribunal also rejected the request jointly presented by ASCAP and SESAC for a fee of $70. This proposal was based upon the lowest figure within a range of figures derived from three "marketplace analogies": (1) $140, representing a combination of ASCAP, BMI, and SESAC fees for music at restaurants, bars, and taverns, and not subject to compulsory license (Pet. App. 39); (2) fees for background music services, approximately $52 (*id.* at 39-40); and (3) compulsory license fees imposed in foreign countries, which averaged $96 (*id.* at 40). The Tribunal

---

[6]Petitioner's presentation was based upon a survey to which only 14% of jukebox operators responded and the results of which conflicted with other published industry data (Pet. App. 51).

[7]The BMI proposal was derived from a fee of approximately $19 found in several legislative reports, adjusted to reflect changes in the Consumer Price Index since 1958, when the $19 figure first appeared (Pet. App. 28, 40-42).

found the ASCAP/SESAC presentation "most attractive," but cautioned (*id.* at 52-53; emphasis added; footnote omitted) that

> [t]hese analogies individually and collectively are subject to limitations and distinguishing features. *We believe that certain of the distinctions set forth in the AMOA [proposed findings] have validity.* While acknowledging that our rate cannot be directly linked to marketplace parallels, we find that they serve as an appropriate benchmark to be weighed together with the entire record and the statutory criteria.

The Tribunal found that $50—a figure substantially below the $70 proposal advocated by ASCAP/SESAC—was reasonable and best advanced the competing goals of Section 801(b)(1) (Pet. App. 53-57). The Tribunal concluded that the phasing-in of the fee would alleviate any disruptive impact to the jukebox industry and that the inflation adjustment was needed to insure that copyright owners were fairly treated in view of the fact that the rate is to remain in effect until at least 1990 (*id.* at 56-57).[8]

---

[8]Two members of the Tribunal filed dissenting opinions urging that the fee should have been set at a higher level. Commissioner Garcia, without elaboration, stated that she would have set the fee at $60, phased in initially at $30 (Pet. App. 58). Commissioner James felt that the only credible evidence of marketplace value was presented by ASCAP/SESAC (*id.* at 59). Furthermore, Commissioner James believed that the majority was too solicitous of the jukebox industry's alleged hardship and had not sufficiently considered the existing disruption to copyright owners (*id.* at 62). He believed that the agency should have set a fee of at least $130 in order to satisfy the statutory standard (*id.* at 63).

3. ASCAP and AMOA petitioned for judicial review pursuant to Section 810 of the Act.[9] The court of appeals affirmed the decision of the Tribunal in all respects (Pet. App. 1-32). The court held that the agency acted lawfully when it used the ASCAP/SESAC analysis as a starting point in determining an appropriate royalty fee (*id.* at 26-27; citations omitted):

> We think that the Tribunal could properly take cognizance of the marketplace analogies while appraising them to reflect the differences in both the respective markets * * * and the regulatory environment. It is quite appropriate and normal in this administrative rate determination process to find distinguishing features among various analogous situations affecting the weight and appropriate thrust of evidence rather than its admissibility. No authority cited by AMOA would require the Tribunal to reject the ASCAP/SESAC analogies. Comparable rate analogies have been repeatedly endorsed as appropriate ratemaking devices. * * * Moreover, we believe that ASCAP/SESAC presented the most credible and relevant evidence before the Tribunal. The arguably analogous musical fees provide substantial evidence of the value of the right to play copyrighted music on a jukebox, and the agency did not act arbitrarily or capriciously under the circumstances in considering these fees as a benchmark.

The court of appeals sustained the Tribunal's refusal to attempt to set the fee by determining "the value of individual musical works based on the time and expense incurred by songwriters in producing each work, together with a

---

[9]Under this provision, the United States Court of Appeals has jurisdiction to review the Tribunal's final decisions under the standards set forth in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (see Pet. App. 10).

value derived from the placement of a work on a popularity chart" (Pet. App. 7-8). The court observed that the Tribunal's approach of utilizing evidence of composite value was somewhat analogous to the Federal Power Commission's approach of relying on composite costs in setting uniform area rates for wellhead sales of gas under the Natural Gas Act (*id.* at 8 & n.3).

The court of appeals also upheld the flexible structure of the fee (Pet. App. 22; footnote omitted):

> We believe that both the phase-in-mechanism and the inflation adjustment, which cut in opposite directions, merely demonstrate a flexibility with which Congress intended to endow the Tribunal in making its determinations. * * * There is nothing in this language [17 U.S.C. 801(a)(1)] to preclude a reasonable royalty from including a device to ease the disruption attendant upon a new fee substantially departing from the current level; in fact, section 801(b)(1)(D) imposes the contrary requirement. * * * Similarly, a cost of living or other inflation adjustment designed to maintain the real value of the fee set by the Tribunal is not prohibited but is instead affirmatively supported by the language of the Act.

ARGUMENT

The basic question in this case is whether the royalty fee established by the Tribunal for coin-operated phonorecord players is consistent with the standards set forth in Section 801(b)(1) of the Copyright Act. The decision of the court of appeals upholding the Tribunal's determination is correct, does not conflict with the decision of any other court, and does not warrant review.

1. Petitioner asserts that in arriving at a $50 fee the Tribunal improperly utilized the ASCAP/SESAC analogies because they are "all instances of monopoly pricing"

(Pet. 11). Even if petitioner's premise is correct, it does not follow that the court of appeals erred in affirming the Tribunal's final rule.[10]

Contrary to petitioner's contention (Pet. 11), the Tribunal did not "rel[y] solely" on the analogies. As the court of appeals correctly observed, they were used simply as "points of reference to be weighed together with the entire record and the statutory criteria" (Pet. App. 27). Nor did the Tribunal find them "conclusive" (Pet. 11). Rather, the Tribunal acknowledged that its determination could not be "directly linked" to the ASCAP/SESAC data (Pet. App. 52-53). The resulting royalty fee determined by the Tribunal substantially departed from the figure sought by ASCAP and SESAC.

It is thus apparent that the agency in this case simply began its inquiry from the only credible reference points presented by any of the participants in the rule making proceeding. Having properly rejected petitioner's evidence as unreliable, a point not contested here, the Tribunal turned its attention to the useful evidence remaining. See *American Textile Manufacturers Institute* v. *Donovan*, 452 U.S. 490, 525 (1981). In making its determination as to an appropriate fee, however, the agency was careful to recognize the limitations of that evidence. The court of appeals found this approach to be a "quite appropriate and

---

[10]We question petitioner's blanket characterization of all the analogies as involving "monopoly pricing." The analogy described by ASCAP's witness as "particularly appropriate" was for license fees paid for jukeboxes in foreign countries. These fees are either negotiated with industry groups or are subject to government approval (Pet. App. 40). The record reflects that foreign fees ranged widely, from $31.70 in Greece to $2,000 in Paris. The record also showed that the jukebox fee in England was 37.50 pounds, a figure almost identical to the rate for background music in an English pub. ASCAP/SESAC Proposed Findings at 26-28.

normal" exercise of the agency's rate making function (Pet. App. 26). Given the nature of the record below, the agency's limited consideration of the analogies proferred by ASCAP/SESAC was perfectly reasonable.

2. Section 801(b)(1) of the Act requires royalty fees for jukebox performances and for recording songs to be "reasonable." Congress provided additional guidance, requiring that the rates be "calculated to achieve" a series of "objectives."[11] One of the objectives is to "afford the copyright owner a fair return for his creative work." 17 U.S.C. 801(b)(1)(B). Petitioner advocated an interpretation of this provision that would have required the Tribunal to engage in a "cost of service" analysis with respect to artists. The Tribunal concluded that neither the language of the Act nor its legislative history supported imposition of this improbable burden upon copyright owners (Pet. App. 48-50). The court of appeals ruled (*id.* at 29-30) that petitioner's argument was undercut by Section 116(c)(4)(B) of the Act, which provides that the fees may be collectively awarded to the performing rights societies. The court observed that this statute "evinces Congress' recognition of the collective nature of the ratemaking process in these circumstances" (Pet. App. 30). As the court explained (*ibid.*), "we believe it would be not only improper but also impossible to attempt to provide each copyright owner with an appropriate return on his or her 'investment' in copyrighted material."

The court of appeals was clearly correct in rejecting petitioner's attempt to superimpose concepts applied in public utility ratemaking proceedings in the vastly different context presented here. Indeed, the notion of ascertaining a

---

[11]These objectives are not "requirements," as petitioner asserts (Pet. 18). They are competing policies to be considered in selecting a reasonable rate. See *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F. 2d 1, 9 (D.C. Cir. 1981).

creative artist's "rate base" or "cost of service" seems patently absurd on its face. The market determines, when it can, the "fair return" for a melody. The Tribunal's inquiry into *value* is thus the most appropriate approach. A showing that some composers have large incomes and low costs would have little or no relevance in determining a reasonable fee.

Moreover, petitioner's reliance (Pet. 18-19) on *Recording Industry Association of America* v. *Copyright Royalty Tribunal*, 662 F. 2d 1 (D.C. Cir. 1981), is misplaced. That case involved the phonorecord fee for recordings under Section 115 of the Copyright Act. It is true that the "fair return for creative work" objective in Section 801(b)(1)(B) applies both to the phonorecord fee in Section 115 as well as to jukebox fees under Section 116. In contrast to the jukebox fee, however, phonorecord fees are generally paid to individuals. Thus, the fact that the court in *Recording Industry* approved the Tribunal's assessment of evidence relating to copyright owners' royalty incomes (662 F. 2d at 10-11 & n.25)[12] would not demonstrate that the Tribunal acted arbitrarily here in refusing to engage in a similar analysis. Indeed, the court in *Recording Industry* observed that "the 'fairness' of the return to a songwriter for his creative effort cannot be defined by the traditional methods of cost of service ratemaking; a broader inquiry is called for." 662 F. 2d at 9 (footnote omitted). Furthermore, we note that the Tribunal observed in this case that the jukebox fee level would have only a marginal or incremental effect

---

[12]Petitioner errs in asserting (Pet. 19 & n.14) that the Tribunal in *Recording Industry* considered evidence of copyright owners' *costs*. Instead, the evidence adverted to by the court in *Recording Industry* showed that copyright owners' *royalties* had declined over time in comparison to copyright users' royalties and to wholesale record prices. 662 F. 2d at 11 n.25. Since, in the past, jukebox operators paid *nothing* to the copyright owners for the exploitation of their works, similar evidence was not available in this case.

on creative effort (Pet. App. 54). In *Recording Industry*, on the other hand, "[t]he Tribunal found that the current rate was too low to provide a financial incentive that would maximize the production of creative works * * *." 662 F. 2d at 11.

3. Finally, contrary to petitioner's contention (Pet. 20-23), the Tribunal did not exceed its statutory authority in setting a flexible fee schedule, with a phase-in device to minimize disruptive impact and an inflation adjustment to maintain the relative value of the fee after 1986.

In Section 801(b)(1), Congress explicitly directed the Tribunal "to make determinations *concerning the adjustment* of *reasonable* copyright royalty rates * * *" (emphasis added). As the court of appeals correctly concluded (Pet. App. 22), this language empowered the Tribunal to adopt a flexible schedule that provides both for easing the disruptive effects on the jukebox industry of imposing a fee substantially higher than the prevailing fee[13] and for maintaining the real value of the new fee by means of an automatic inflation adjustment mechanism. See *Recording Industry Association of America* v. *Copyright Royalty Tribunal, supra,* 662 F. 2d at 17 (upholding Tribunal's adoption of automatic rate adjustment mechanism in phonorecord fee proceeding). If the Tribunal had acted here on the basis of petitioner's argument that it may not establish automatic fee adjustments, the Tribunal presumably would have selected a higher fee in order to incorporate future inflationary expectations. Such a fee would have been more disruptive at its inception and less likely to achieve a balancing of the goals set forth in Section 801(b)(1).

---

[13]Section 801(b)(1)(D) provides that the fee adopted by the Tribunal shall be calculated, *inter alia*, "[t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

Furthermore, the mere fact that the statute provides for periodic review of the fee at ten-year intervals (17 U.S.C. 804(a)(2)(C)) does not support petitioner's contention (Pet. 20-21 & n.16) that Congress intended the fee established by the Tribunal in 1980 to remain frozen for a decade at a fixed dollar level. Instead, the legislative history shows that Congress, which created the Tribunal without a permanent staff to perform its professional responsibilities (see *National Cable Television Association* v. *Copyright Royalty Tribunal*, No. 81-1005 (D.C. Cir. Sept. 10, 1982), slip op. 23 n.74), "has chosen to stagger the times for review of the various rates established under the bill so as to balance the workload of the [Tribunal]." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 173 (1976).

Petitioner errs in relying (Pet. 22) on the Tribunal's rejection of an inflation adjustment mechanism in the very different context of cable television fees. In its recent decision upholding the Tribunal's determination in the cable television fee proceeding, the D.C. Circuit summarized the court of appeals' holding in this case and noted that there are "certain clear differences between the Tribunal's authority to set cable rates and its jurisdiction over the [jukebox industry]"—differences that warranted the different results reached in the two cases. *National Cable Television Association* v. *Copyright Royalty Tribunal, supra*, slip op. 13. The court pointed out that "the operators of jukeboxes pay royalties that contrast sharply both in form and in the manner of adjustment with those required of cable users. While the cable provisions key rates to a percentage of gross receipts attributable to use of the copyrighted material, the * * * jukebox sections of the Act set out fixed dollar amounts that must be paid according to the number of 'copies' made by the licensee." *Id.* at 14 (footnote omitted). In addition, Congress recognized that "the reasonableness of the [jukebox] rates could change over time and therefore

delegated to the Tribunal the essentially legislative task of revisiting them every ten years. Thus, in periodic review of the rates, the Tribunal must determine 'reasonable' fees in light of four broad objectives of copyright law. In contrast, the cable provisions permit rate adjustment 'solely' for the purpose of maintaining the dollar value of the initial rate schedule." *Id.* at 15 (footnotes omitted). The D.C. Circuit accordingly concluded (*id.* at 16; footnotes omitted):

> In the face of these differences in its authority to adjust rates, the Tribunal could reasonably conclude that the purpose of the periodic review provisions, and therefore the effect of interim adjustments, varies among the different industries covered by the Act. The wide-ranging nature of the * * * jukebox proceedings, as well as the long history of copyright law for phonographs, apparently led Congress to conclude that rulemakings conducted more frequently than every ten years would be unnecessarily time-consuming and expensive. Since an automatic inflation adjustment does not require reconsideration of the broad policy objectives addressed every ten years, it does not frustrate the purpose of periodic review in [that] field[]. With respect to cable, on the other hand, these concerns seem less acute. In that area, the Tribunal must simply monitor the rate base selected by Congress to see that it keeps pace with inflation. Congress could have easily required the agency to undertake this predominantly ministerial task every year, especially since both inflation and the structure of subscriber charges are likely to change rapidly. Instead, it expressly limited the review to five-year periods. The Tribunal could fairly infer from that directive, then, that semi-annual performance of essentially the same assignment would thwart Congress' definitive intent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

WILLIAM KANTER
BRUCE G. FORREST
Attorneys

SEPTEMBER 1982

DOJ-1982-09